87-933

No.

Supreme Court, U.S.
FILED
DEC 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GORDON MIMS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

DANIEL J. STOHR
35 East Wacker Dr.
Chicago, Ill. 60601
312-726-1180

JULIUS LUCIUS ECHELES
205 West Wacker Drive
Chicago, Ill. 60606
312-782-0711

Counsel for Petitioner

QUESTION PRESENTED

1. Where the Illinois Appellate Court's conclusion that the evidence was "sufficient" to prove petitioner's guilt of burglary beyond a reasonable doubt, rests entirely on inferences piled upon inferences in violation of due process principles enunciated in United States v. Ross, 92 U.S. (23 Wall.) 281 (1876), and the evidence raises a mere suspicion he might be guilty, does petitioner's conviction violate due process of law and conflict with the presumption of innocence and requirement of proof beyond reasonable doubt per such decisions as In re Winship, 397 U.S. 358 (1970), Sandstrom v. Montana, 422 U.S. 510 (1979), and Thompson v. Louisville, 362 U.S. 199 (1960).

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Where the evidence (at most) raises a mere suspicion that petitioner might be guilty of burglary, and the Illinois Appellate Court's affirmance is entirely based on inferences piled upon inferences, petitioner's conviction violates due process principles encompassing presumption of innocence and requirement of proof beyond a reasonable doubt.

Certiorari should be allowed because the instant decision conflicts with due process principles enunciated in such decisions as United States v. Ross, 92 U.S. (23 Wall.) 281 (1876), In re Winship, 397

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GORDON MIMS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner, Gordon Mims (hereafter, defendant), prays that a writ of certiorari issue to review the order and judgment of the Appellate Court of Illinois, First

Judicial District, affirming his conviction for burglary.

JUDGMENT AND ORDER BELOW

The Order of the Appellate Court of Illinois, First Judicial District, (unpublished per Supreme Court Rule 23), 1/ No. 86-1146, is set out as Appendix A.

JURISDICTIONAL STATEMENT

On January 29, 1987, the Appellate Court of Illinois, First Judicial District, filed its unpublished Order. (App. A) Defendant's timely petition for rehearing was denied on April 9, 1987, (App. B), and his

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1/ Ill.Rev.Stat. 1982, Chap. 110A, par. 23.

timely Petition for Leave to Appeal to the Supreme Court of Illinois was denied on October 7, 1987. (App. B)

This Petition to review the judgment of a state court of last resort is timely filed within 60 days after denial of Petition for Leave to Appeal. Jurisdiction is invoked under 28 U.S.C. Sec. 1257(3) and Rules 20.1 and 20.4 of this Court.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1. ... No State shall ... deprive any person of ... liberty ..., without due process of law; ..."

Ill.Rev.Stat. 1985, Chap. 38, par. 19-1(a), provides, in pertinent part:

"A person commits burglary when without authority he knowingly enters ... a building ... with intent to commit ... a felony or theft."

STATEMENT OF THE CASE

Nature of the Case

Defendant was convicted of burglary in violation of Ill.Rev.Stat. 1985, Chap. 38, par. 19-1(a), following a bench trial, and sentenced to 6 years imprisonment. On appeal, he contended he was not proved guilty beyond a reasonable doubt. (See App. A, p. 1) The Appellate Court affirmed, (App. A), and denied petition for rehearing. (App. B) The Illinois Supreme Court denied leave to appeal. (App. C)

Statement of Facts

The evidence adduced at trial is fully set out in the Appellate Court's Order (App. A, pp. 1-5)

In brief, the facts are:

At approximately 1:30 a.m. on September 3, 1984, Chicago Police Officer Hollis Petway and his partner responded to a police radio broadcast of "burglary in progress" at an elementary school in Chicago. (R. 5 2/; App. A, p. 2) Officer Petway approached the front of the school; however, the Record is silent as to whether he observed anyone in front of the school. He

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2/ Here and hereafter, "R." refers to the Record on Appeal in the Appellate Court of Illinois, First Judicial District, which Record includes the Transcript of Proceedings.

then drove around the building, inspecting the school exterior. (R. 6) On the other side of the building, on the second floor, a window was partially open. (R. 12) Petway then returned to the front of the building, where he saw defendant and an unknown other person run from an alcove near the school's front door. (R. 12-14)

Defendant testified he had stopped to light a cigarette in the shelter of the alcove when the door burst open and a stranger ran out. (R. 34) Defendant ran. (R. 7,34) He was arrested 1/2 block away, walking towards the officer and the school. (R. 9,10) The other person was never arrested. The school door was locked; there was no sign of forced entry or pry marks; the officer never saw anyone leave by way of the door. (R. 12,14,22)

In affirming defendant's burglary conviction, the Appellate Court's ultimate conclusion -- that "the evidence presented at trial gives rise to an inference that defendant and his accomplice unlawfully entered the school premises with the intent of committing theft," (App. A, p. 9) -- is wholly built on speculation and conjecture. (See App. A, p. 9)

Raising the Federal Question Below

In the trial court, via motions for directed finding at the close of the State's case, and at the close of all the evidence, and, after finding of guilty, via motion for new trial, and in the Appellate Court (See App. A, pp. 1-9), defendant argued, inter alia, that the evidence did not prove his guilt of burglary beyond a reasonable doubt. In the Appellate Court, he further argued

that conviction impermissibly was based on inferences piled upon inferences in violation of principles set out in United States v. Ross, 92 U.S. (23 Wall.) 281,283-84 (1876). (Def. Br. in App. Ct., No. 86-1146, pp. 13-14). On Petition for Rehearing, he further argued that the Appellate Court's mode of decision violates federally guaranteed due process principles. (Pet. for Rhrg., pp. 1-3) In the Supreme Court of Illinois, based on the Appellate Court's conjectural affirmance, defendant argued that his conviction violates federally guaranteed principles of the presumption of innocence and requirement of proof beyond reasonable doubt as embodied in due process of law per such decisions as In re Winship, 397 U.S. 358 (1970), and Sandstrom v. Montana, 442 U.S. 510 (1979).

(Petition for Leave to Appeal, No. 65267, pp. 2-4).

REASONS FOR GRANTING THE WRIT

> Where the evidence (at most) raises a mere suspicion that defendant might be guilty of burglary, and the Illinois Appellate Court's affirmance is entirely based on inferences piled upon inferences, defendant's conviction violates due process principles encompassing presumption of innocence and requirement of proof beyond a reasonable doubt.
>
> Certiorari should be allowed because the instant decision conflicts with due process principles enunciated in such decisions as United States v. Ross, 92 U.S. (23 Wall.) 281 (1876), In re Winship, 397 U.S. 358 (1970), Sandstrom v. Montana, 442 U.S. 510 (1979), and Thompson v. Louisville, 362 U.S. 199 (1960).

The Illinois Appellate Court's conclusion that the evidence was sufficient to prove defendant's guilt beyond reasonable

doubt should be reversed, because the evidence, at most, raises a mere suspicion that defendant might be guilty of burglary. That Court's ultimate conclusion is infirm, consisting of inferences piled upon inferences in violation of due process principles embodied in such decisions as United States v. Ross, 92 U.S. (23 Wall.) 281 (1876), In re Winship, 397 U.S. 358 (1970), and Sandstrom v. Montana, 442 U.S. 510 (1979).

The presumption of innocence and requirement of proof beyond a reasonable doubt are constitutionally rooted principles, inherent in due process of law. In re Winship, supra; Sandstrom v. Montana, supra. Affirmance at bar violates these precepts.

Even taking the evidence most favorably to the prosecution, the most that can be

said for the prosecution's case is that defendant was observed outside the school building, leaving from an alcove area. There is no evidence whatsoever that defendant (or anyone) was ever inside the premises with intent to commit therein a felony or theft, as is required to support conviction for burglary. (See statute, set out at p. 4, supra; Ill.Rev.Stat. 1985, Chap. 38, par. 19-1(a).)

The Appellate Court's ultimate conclusion -- that "the evidence presented at trial gives rise to an inference that the defendant and his accomplice unlawfully entered the school premises with the intent of committing theft," (App. A, p. 9) -- is wholly built on speculation and conjecture, in violation of due process principles as enunciated by this Court in United States v. Ross, supra, that conclusions formed from

inferences pile upon inferences -- as at bar -- are constitutionally infirm.3/

3/ "The[se] are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed." Id. at 283-84. (Emphasis added.)

Because defendant never was observed inside or even leaving the building, but was only seen in the area of the outer alcove, the evidence is entirely circumstantial. It requires impermissible mental leaps to connect him with the offense of burglary, which requires proof of entry with intent to commit a felony or theft in the building. In the case at bar, both the essential element of entry into the premises, and the distinct and equally essential element of intent with which such entry (if any) was made, are not established by the standards required by law.4/

4/ In keeping with the due process principles of Ross, Winship, and Sandstrom, all, supra, under Illinois decisional law, a conviction resting entirely upon circumstantial evidence -- as

(Footnote continued on following page)

Only by use of constitutionally impermissible inferences and speculations has the Appellate Court managed to affirm.

Moreover, the instant decision conflicts with the well-established principle that presence plus flight does not

4/ continued
at bar -- cannot stand unless the evidence excludes every reasonable hypothesis of innocence. See, e.g., People v. Garrett, 61 Ill.2d 151, 339 N.E.2d 753,759 (1975) (reversing bench murder conviction); People v. Harbold, 124 Ill.App.3d 363, 464 N.E.2d 734,740 (1st Dist. 1984) (reversing jury murder conviction). If any element of the offense is not supported by evidence, but is concluded purely on supposition and conjecture, the reviewing court must reverse:

> "The presumption of innocence is not overcome by speculation, or by probabilities, and where the evidence is such as fairly permits an inference consistent with innocence it will not support a conviction." People v. Johnson, 31 Ill.2d 321, 201 N.E.2d 367,369 (1964). (Emphasis added.) (reversing bench trial conviction).

establish guilt.5/

* * *

The Appellate Court's judgment is based on the collective belief of the Judges that defendant is guilty, albeit that belief necessarily is based on nothing more than bald conjecture and impermissibly speculative inferences. Indeed, defendant's conviction is so devoid of evidentiary support that it violates, not only the due

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5/ See, e.g., In re Whittenburg, 37 Ill.App.3d 793, 347 N.E.2d 103 (1st Dist. 1976); People v. Mitchell, 59 Ill.App.3d 367 N.E.2d 531 (1st Dist. 1978); People v. Williams, 140 Ill.App.3d 784, 489 N.E.2d 28 (5th Dist. 1986); People v. Peters, 55 Ill.App.3d 226, 371 N.E.2d 156 (2nd Dist. 1977); People v. Delp, 85 Ill.App.3d 463, 406 N.E.2d 903 (5th Dist. 1980).

These decisions demonstrate that Illinois reviewing courts reverse where purely circumstantial evidence is consistent with innocence -- as here.

process/presumption of innocence/reasonable doubt principles of Ross, Winship and Sandstrom, supra, but also the due process principle established in Thompson v. Louisville, 362 U.S. 199 (1960), that a conviction devoid of evidentiary support violates due process of law.

Accordingly, certiorari should be allowed, to permit this Court to vindicate defendant's due process rights while at the same time instructing the Illinois Appellate Court -- and, by example, reviewing courts generally -- that this Court will not tolerate violation of the vital due process principles summarized above.

C O N C L U S I O N

For the foregoing reasons, certiorari should be allowed. And, on the merits,

defendant's conviction should be reversed because it violates due process of law.

Respectfully submitted,

DANIEL J. STOHR
35 East Wacker Dr.
Chicago, Ill. 60601
312-726-1180

JULIUS LUCIUS ECHELES
205 West Wacker Drive
Chicago, Ill. 60606

Counsel for Petitioner

APPENDIX A

86-1146

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	) Appeal from the) Circuit Court of) Cook County.
v.	) Honorable) Howard Miller,
GORDON MIMS, Defendant-Appellant.	) Judge Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Following a bench trial, defendant Gordon Mims was convicted of burglary (Ill.Rev.Stat. 1985, ch. 38, par. 19-1(a)) and sentenced to six years in the Illinois Department of Corrections. On appeal the defendant contends that he was not proved guilty beyond a reasonable doubt.

On September 3, 1984, at approximately 1:30 a.m., Chicago police officer Hollis Petway and his partner responded to a police radio broadcast advising that a burglary was in progress at the Sbarbaro Elementary School located at the corner of Ingleside and 85th Street in Chicago. Officer Petway testified that upon arrival at the school he and his partner, Harrison Mailey, drove around the perimeter of the school, beginning at the west-front entrance to the building, using the squad car spotlight to illuminate the area. As they neared the completion of their inspection of the building exterior and arrived near the front entrance to the school, Officer Petway observed two black men fleeing from an alcove that surrounded the front doors. Petway and his partner pursued the suspects in their vehicle west on 85th street until

the suspects turned south into an alley. Thereafter, the officers parked the vehicle and pursued the men on foot. Petway testified he did not observe the defendant in the alley, but recovered a pair of shoes near the fence of a backyard adjacent to the alley. Reentering the squad car, Petway drove to Ingleside, where he observed the defendant walking southbound on that street. Approaching the defendant, Petway observed that defendant was barefoot and breathing heavily.

On cross-examination, Petway's testimony revealed that the front entrance to the school is enclosed by a four- to six-foot deep alcove surrounding the doors. Further testimony revealed that he did not observe the two men exit the building, rather he observed them running from the alcove.

The defendant testified that he resided at 834 East 84th Street, approximately two and a half blocks from the Sbarbaro School. Defendant's testimony revealed that at 1 a.m. on September 3, 1984, he exited his home without shoes and proceeded to the gas station located at 85th and Cottage Grove to purchase cigarettes. After purchasing the cigarettes, the defendant proceeded on his journey home via the east side of Ingleside. Upon reaching the Sbarbaro School, the defendant testified he walked up the front steps and into the alcove surrounding the front doors in order to block the wind while he lit a cigarette. According to defendant, while in the alcove, the front doors burst open, an unknown man ran out and a squad car pulled up. Further testimony revealed that a police officer exited his car and pursued the suspect down a nearby alley, and that

defendant remained in front of the school because he was "scared." Thereafter, the defendant testified that he ran in the direction that the officer had pursued the suspect. After running down an alley and through a backyard, he found himself on Ingleside south of the school, where he sat on a resident's porch until the police noticed him. Throughout defendant's testimony, he denied that he ever entered the Sbarbaro School and that he knew the identity of the other suspect.

After closing argument, the trial court found the defendant's testimony incredible and entered a finding of guilty. On appeal, the defendant contends that the testimony adduced at trial fails to establish that he unlawfully entered the Sbarbaro School premises.

"A person commits burglary when without authority he knowingly enters ... a building ... with intent to commit ... a felony or theft." (Ill.Rev.Stat. 1985, ch. 38, par. 19-1(a); see People v. Gilman (1983), 113 Ill.App.3d 73, 446 N.E.2d 595.) The crime of burglary can seldom be proved by direct evidence of an actual breaking and entering. (People v. Richardson (1984), 104 Ill.2d 8,13, 470 N.E.2d 1024; People v. Hohmann (1966), 72 Ill.App.2d 374, 219 N.E.2d 621.) In most cases, the entry may be inferred from other facts in evidence or circumstances proved. People v. Blakeney (1978), 59 Ill.App.3d 119, 375 N.E.2d 1309; People v. Davis (1977), 54 Ill.App.3d 517, 369 N.E.2d 1376; People v. Cokley (1977), 45 Ill.App.3d 888, 360 N.E.2d 545; People v. Hohmann (1966), 72 Ill.App.2d 374, 219 N.E.2d 621.

The defendant relies on People v. Borden (1967), 84 Ill.App.2d 442, 228 N.E.2d 248, to support his contention that the State failed to prove he entered the subject premises. In Borden, the defendant was charged with burglary after being apprehended exiting the basement beneath, but not part of, a clothing store. Although it appeared the defendant attempted to break through the basement ceiling to enter the store premises, the appellate court reduced his burglary conviction to attempted burglary because the evidence conclusively established that the subject premises had not been entered. In the case at bar, unlike Borden, the evidence does not reveal that the school premises were not unlawfully entered. To the contrary, the defendant's testimony reveals that at least one other suspect was in the school building.

Although the defendant's presence near and fleeing from the scene of the crime does not establish his guilt (In re Whittenburg (1976), 37 Ill.App.3d 793, 347 N.E.2d 103), the facts and circumstances of the instant case reveal the defendant's involvement. Upon arriving at the Sbarbaro School, Officer Petway observed that the front alcove entrance to the school area was empty and within a matter of minutes, after surveying the perimeter of the building, observed the defendant and another suspect fleeing from that alcove. Further, the testimony of Officer Petway established that he pursued the defendant down the alley, retrieved a pair of shoes and arrested the defendant one-half block away from the school while defendant was barefoot and breathing heavily. The defendant's testimony that he exited his home without

shoes to purchase cigarettes, stopped in the alcove within the short period in which Officer Petway was surveying the school property and ran because he was scared, is inherently improbable. Human experience dictates that the circumstances presented in the instant case establishes defendant and his accomplice had entered the school building on the night of September 3, 1984, and was fleeing the scene when he noticed that the police had arrived. (See People v. Davis (1977), 54 Ill.App.3d 517, 369 N.E.2d 1376.) Further, after a thorough review of the record, the evidence presented at trial gives rise to an inference that the defendant and his accomplice unlawfully entered the school premises with the intent of committing theft.

For the reasons set forth, we affirm the judgment of the circuit court. Pursuant

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to People v. Nicholls (1978), 71 Ill.2d 166, 374 N.E.2d 194, we grant the State's request that defendant be assessed $50 as costs for the State's defending this appeal, and incorporate it as part of our judgment.

Dated at Chicago, Illinois, this 29th day of January, 1987.

MEL JIGANTI, GLENN JOHNSON and DAVID LINN, JJ.

APPENDIX B

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
v.	)	No. 86-1146
GORDON MIMS,	)	
Defendant-Appellant.	)	

ORDER

This cause coming on to be heard on defendant-appellant's petition for rehearing, and the court being advised in the premises;

IT IS HEREBY ORDERED that the petition for rehearing is denied.

Order entered April 9, 1987

Mel Jiganti (S)
Justice

Glenn Johnson (S)
Justice

David Linn (S)
Justice

APPENDIX C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
(217) 782-2035

October 7, 1987

Mr. Daniel J. Stohr
Attorney at Law
35 E. Wacker Dr.
Chicago, IL 60601

No. 65267 - People State of Illinois, respondent, v. Gordon Mims, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 29, 1987.